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From:

Sent: Tuesday, February 21, 2012 7:23:57 AM

To:

Cc:

Subject: FW: Lewis v. Reynolds

Hi--I have dwelled on this some more, and my analysis is below. Let me know if you want to discuss.

The original question involved offset of an overpayment of one type of excise tax against a liability for another type of tax, pursuant to section 6402(a). The liability at issue was shown on a return, but mistakenly never assessed. The assessment period has run. The Service issued refund checks and the taxpayer returned them, recognizing that he owed the tax for the period and the refund check was issued erroneously.

In our original response, we discussed the application of Rev. Rul. 85-67 and Lewis v. Reynolds, which provides authority for the position that the Service is entitled to retain payments received during the assessment period, even if the liability is never assessed and the ASER has now passed. Such payment would not be an overpayment for purposes of section 6401. It follows that the liability could be offset against overpayments for other taxes, under section 6402(a).

In our original response, we concluded that Rev. Rul. 85-67 did NOT apply under the facts of your case, because there was no payment within the assessment period. It turns out we misunderstood your facts: the taxpayer had paid the tax within the assessment period. Thus, I provided a corrected response in the 2/10 2:40 p.m. email below.

You are now asking whether we can argue that Rev. Rul. 85-67 is not applicable because of the distinguishing fact that we issued refund checks to the taxpayer, and the taxpayer returned them (after expiration of the ASER). In other words, can we argue that the relevant payment date is the date the taxpayer returned the refund checks, rather than the original payment of tax within the assessment period.

As I preliminarily concluded below, I don't see how the return of the refund check can be deemed a "payment" of tax, given that the taxpayer had already paid the tax. I think it was an erroneous refund. Because the taxpayer paid the tax within the assessment period, there was no overpayment of tax under section 6401, as discussed in Rev. Rul. 85-67. As there was no overpayment, we had no authority to issue a refund check and the refund was erroneous. As the refund was erroneous, the taxpayer properly returned the check.

I found no authority to suggest return of a refund check could be considered payment of the tax for purposes of section 6401. There is law addressing whether a remittance is a "payment" v. "deposit" of tax, and the relevant analysis is focused upon the intent of the taxpayer in making the remittance. A taxpayer returning a check is not intending or attempting to pay the taxes, he is just voluntarily returning a check he understands to be issued in error because he owed and previously paid the tax.

In this case, the taxpayer made a payment which was not an overpayment, under the analysis of Rev. Rul. 85-67. Thus, the refund check was erroneous. If a return of an erroneous refund check could be considered a "payment" for purposes of section 6401(a), it would be an overpayment because the check

was returned after the ASER. Thus, by sending back the erroneous refund check, the taxpayer would transform an erroneous refund into a legitimate overpayment, and be entitled to keep a check issued by mistake. This doesn't make sense.